NOTES

LIMITATIONS ON STATE POLICE POWER UNDER THE "DUE PROCESS" AND "EQUAL PROTECTION" CLAUSES.—The inadequacy of the typical judicial interpretation of the "due process" and "equal protection" clauses of the Fourteenth Amendment is again illustrated in the recent case of *Truax* v. *Corrigan* (1921) 42 Sup. Ct. 124. The state of Arizona in framing its judicial code included a provision in terms substantially like the labor section of the Clayton Act,[1] forbidding the issue of injunctions to restrain peaceful picketing.[2] The defendant's union, having fallen into a dispute with the plaintiff, a restaurateur, over the conditions of employment of some of its members, called a strike. As part of their tactics they picketed the plaintiff's place of business, setting up placards and distributing handbills which abused him. As a result the plaintiff's business dwindled considerably. He sought an injunction. The Supreme Court of Arizona, applying the local statute, denied the injunction.[3] On appeal, the United States Supreme Court, Justices Brandeis, Holmes and Pitney (with whom Clarke concurred) dissenting, held the statute unconstitutional as violating the Fourteenth Amendment.

The court first considered the "due process" clause, realizing that it frequently overlaps the "equal protection" clause. The court freely grants that property rights are not absolute, but may be diminished in accordance with due process. What is "due process"? The phrase is, *per se*, colorless, and like the commerce clause, correspondingly susceptible to legalistic manipulation. The question is: what process is due? The words carry no fertilizing power.[4] In an early case a litigant urged that they were intended to safeguard traditional rights, like indictment by grand jury.[5] The court, however, decided otherwise. To permit due process to encase the law in fixed molds would be to stop all progress.

If due process was to have any other significance than as a declaration of

---

[1] (1914) 38 Stat. 730, 738, U. S. Comp. Stat. (1916) § 1243d.

[2] By an undue emphasis on the word "peaceful," construing it to mean that the Act legalizes the placing of one man at a point of egress and ingress to a place of business to convey accurate information about the strike to prospective employers and customers the Supreme Court sustained the labor clause. *American Steel Foundries* v. *Tri-City Central Trades Council* (1921) 42 Sup. Ct. 72. The Arizona Court gave 'peaceful" its dictionary meaning—persuasion unaccompanied by violence or threats of violence. *Truax* v. *Corrigan* (1918) 20 Ariz. 7, 176 Pac. 570. Chief Justice Taft said the statute as thus construed, legalized moral coercion, and was consequently invalid.

In a nutshell the argument of the majority was this. *The Duplex Printing Co.* v. *Deering* (1921) 254 U. S. 443, 41 Sup. Ct. 172, held that a business is a property right, and free access to the place of business for customer and employee is incidental to it. *Jersey City Printing Co.* v. *Cassidy* (1902) 63 N. J. Eq. 759, 53 Atl. 230. See (1921) 21 COLUMBIA LAW REV. 258. Any tortious interference with this property right that causes irreparable damage would be a ground for an injunction. Labor unions, because of their usual economic irresponsibility, have been frequently restrained from picketing. The instant statute is capable of two interpretations. The more probable one is that it legitimatizes a course of conduct of picketing like that of the defendants in the present case. Such a statute is without a precedent. It deprives the plaintiff of property without due process of law. The other interpretation is that the statute simply deprives the plaintiff of an equitable remedy, leaving him an action at law, and the defendant subject to criminal prosecution. Under those circumstances the statute does not afford the plaintiff equal protection of the law.

[3] See *Truax* v. *Corrigan, supra,* footnote 2.

[4] The closest historical analogue is the *lex terrae* of the Magna Carta.

[5] *Hurtado* v. *California* (1884) 110 U. S. 516, 4 Sup. Ct. 111.

existing law, or as an empty phrase, it had to be invested with an ethical content. Property is taken without due process when the state acts arbitrarily,[6] or places one under a liability to which others similarly situated are not subjected.[7] In this latter situation it is akin to equal protection. In other words "unfair" legislation is not "due process." The test of fairness is seldom historical. The problem is: does the legislation operate " . . . in subordination to the fundamental principles of right and justice . . . "?[8]

The court has never catalogued these "fundamental principles." Judicial inclusion and exclusion has been the device used to mark their limits. Consequently a unique situation developed. It has long been settled that the states have a police power.[9] The exercise thereof results in the evaluating and balancing of alleged public needs and private rights.[10] It is a question of public policy. The Supreme Court by its interpretation of due process had assumed the duty of testing the reasonableness of this legislation. It was to measure legislative acts by the yardstick of social needs. Virtually the supreme court became the supreme law-making body.

The court faced two questions at the outset in applying due process. The first was: what are the legitimate purposes of the exercise of the police power? Secondly, what means may the state use to advance such an end? The cases show an extremely inclusive answer to the first question. To preserve the health of the people, administrative regulations of the most stringent sort were permitted.[11] To guard against fraud various types of dealers were required to be licensed.[12] So the sale of colored oleomargarine was forbidden.[13] To insure and facilitate justice, defendants in certain types of cases were compelled to pay a reasonable attorney's fee.[14] Otherwise the judgments obtained by the plaintiffs gave them more moral than financial satisfaction. A statute requiring banks to contribute to a fund to repay depositors of a defunct bank was sustained.[15] The ultimate benefit which is derivable from a greater confidence in the banks, and from avoiding the calamitous results of bank failures warranted the act. Even whimsical reasons, if you may call them reasons, were sufficient to sustain legislation. Thus a law forbidding cemeteries within the city limits was upheld.[16] Counsel for the appellant stressed the great property loss his client would suffer as a result, and sought to demonstrate that a cemetery was in no way deleterious to a city's health. But the court held that it was sufficient if the people thought they would be injured. A similar opinion was expressed in regard to vaccination.[17] The tendency of the court has been to give the police power a free scope.

States have been almost equally free in selecting the means to achieve their police end. An important objection to police regulation has been on the ground of unfair classification, the equal protection aspect of due process. For this reason a statute which applied only to businesses above a certain size was declared in-

---

[6] *Dobbins* v. *Los Angeles* (1904) 195 U. S. 223, 25 Sup. Ct. 18.
[7] *Connolly* v. *Union Sewer Pipe Co.* (1902) 184 U. S. 540, 22 Sup. Ct. 431.
[8] *Truax* v. *Corrigan* (1921) 42 Sup. Ct. 124, 128.
[9] *Commonwealth* v. *Alger* (1851) 61 Mass. 53.
[10] See *License Cases* (U. S. 1847) 5 How. 504, 582, 583.
[11] *St. John* v. *New York* (1906) 201 U. S. 633, 26 Sup. Ct. 554; *Lieberman* v. *Van De Carr* (1905) 199 U. S. 552, 26 Sup. St. 144; see (1922) 22 COLUMBIA LAW REV. 269.
[12] See (1922) 22 COLUMBIA LAW REV. 269.
[13] *Plumley* v. *Massachusetts* (1894) 155 U. S. 461, 15 Sup. Ct. 154.
[14] *Atchison, etc. Ry.* v. *Matthews* (1899) 174 U. S. 96, 19 Sup. Ct. 609; *cf. Seaboard Air Line Ry.* v. *Seegers* (1907) 207 U. S. 73, 28 Sup. Ct. 28; *contra, Gulf, etc. Ry.* v. *Ellis* (1897) 165 U. S. 150, 17 Sup. Ct. 255.
[15] *Noble State Bank* v. *Haskell* (1911) 219 U. S. 104, 31 Sup. Ct. 186.
[16] *Laurel Hill Cemetery* v. *San Francisco* (1910) 216 U. S. 358, 30 Sup. Ct. 301.
[17] *Jacobson* v. *Massachusetts* (1905) 197 U. S. 11, 25 Sup. Ct. 358.

valid.[18] There was no good cause for singling out a business on this ground alone. On the other hand, railroads have been taxed for a fund to provide for their regulation.[19] They produce the need; hence, they should pay for the remedy. The courts say that if there is a probable justification for selecting a particular class on which the law operates, the statute is good.[20] Sweeping, systematic reforms are never required.

One of the important classes of police legislation has been devoted to different aspects of the employer-employee relationship. Thus a statute forbidding the employment of workmen in underground mines more than eight hours a day except in emergencies,[21] and others providing for specific methods of ascertaining and paying wages,[22] have been sustained. More important still have been the decisions upholding the abolition of the employer's defenses of contributory negligence [23] and the fellow servant [24] and assumption of risk doctrines.[25] These reach their height in workmen's compensation cases.[26] None of these laws was held to violate the "fundamental rights" which a due process clause guarantees.[27]

In the light of this mass of judge-made law, the pronouncement of the decision in the instant case seems unsound. The deprivation of property for sentimental reasons is not a violation of due process.[28] Why then does it violate due process, to pass a statute abrogating a method of procedure which in a particular type of case, despite its short career,[29] has been a fruitful source of abuse? Mr. Justice Brandeis points out the storm of controversy which has always enveloped it,[30] and the strong practical considerations against it.[31] To these may also be added the fact that the issue of an injunction of a lower court is really decisive of the employment dispute. Appeals take a considerable time to reach the appellate courts,[32] and meanwhile the restraint of picketing breaks the strike. Even admitting that a statute really deprives a plaintiff of property, because he loses the only effective way of preserving his rights, the result is a typical situation in police power problems. The rights of the employers and employees clash: the legislature decides which shall take precedence.

This argument is strengthened by the analogy which this case presents to other statutes involving the employer-employee relationship, and which the court has

---

[18] *Cotting* v. *Kansas City Stockyards Co.* (1901) 183 U. S. 79, 22 Sup. Ct. 30. In fact the statute applied to one business only. Where it was reasonable to determine the applicability by size, a statute so doing was sustained. *McLean* v. *Arkansas* (1909) 211 U. S. 539, 29 Sup. Ct. 206.

[19] *Charlotte etc. Ry.* v. *Gibbes* (1892) 142 U. S. 386, 12 Sup. Ct. 255.

[20] See discussion in *Noble State Bk.* v. *Haskell, supra,* footnote 15.

[21] *Holden* v. *Hardy* (1898) 169 U. S. 366, 18 Sup. Ct. 383.

[22] *McLean* v. *Arkansas, supra,* footnote 18; *Knoxville Iron Co.* v. *Harbison* (1901) 183 U. S.13, 22 Sup. Ct. 1.

[23] *Missouri P. Ry.* v. *Castle* (1912) 224 U. S. 541, 32 Sup. Ct. 606.

[24] *Missouri Ry.* v. *Mackey* (1888) 127 U. S. 205, 8 Sup. Ct. 1161; see *infra,* footnote 26.

[25] *Second Employers' Liability Cases* (1912) 223 U. S. 1, 32 Sup. Ct. 169.

[26] *New York Central Ry.* v. *White* (1916) 243 U. S. 188, 37 Sup. Ct. 247; *Borgnis* v. *Falk* (1911) 147 Wis. 327, 133 N. W. 209.

[27] *Contra, Ives* v. *South Buffalo Ry.* (1911) 201 N. Y. 271, 94 N. E. 431.

[28] *Laurel Hill Cemetery, supra,* footnote 16.

[29] In *Vegelahn* v. *Gunter* (1896) 167 Mass. 92, 100, 44 N. E. 1077, Justice Field says, "One of the earliest authorities in the United States for enjoining in equity acts somewhat like those alleged against the defendants in the present case is *Sherry* v. *Perkins,* 147 Mass. 212 decided in 1888."

[30] Mr. Justice Brandeis cites many articles in footnote 34 of his opinion.

[31] *Supra,* footnote 8, p. 138.

[32] For instance, though the dispute in the instant case arose in April, 1916, the final decision was rendered in December, 1921; in the *American Foundries* case, *supra,* footnote 2, the dispute arose in 1914, the final decision was rendered December, 1921.

sustained. The Chief Justice attempts to draw a line of demarcation. He says that in the previous line of cases an employer was subjected to liabilities in regard to people with whom he had voluntarily entered into contractual relationship "under a statute." [33] And that in the instant case he incurs liabilities with regard to people with whom the previously existing contractual relationship has been terminated. It is hard to see the difference in the "broad distinction"[34] noted. Suppose an employer wished to escape the loss of the defense of the fellow-servant rule. He could not do it by ceasing to contract with any particular people. He must cease to contract with any employee; in other words abandon the employer status. A similar opening presents itself to the employer in the instant case. He need only employ no help. Then as to him the statute is inoperative. The court's comment is capable of another interpretation which results in equal invalidity; namely, that in the "workmen's" cases the employee may contract away his rights, whereas in the instant case, he may not. Frequently workmen's statutes expressly forbid the contracting away of the employee's privileges.[35] Similarly both types of statutes apply to present and prospective employers. If the abolition of the assumption of risk defense is constitutional, so should be the elimination of the injunction in labor disputes.

The distinction between "due process" and "equal protection" arises through a shifting of emphasis. The court treated the latter separately, but equally fallaciously. While it recognizes that "equal protection" does not mean that all people who might conceivably or even more sensibly have been grouped, must be, it fails to apply the rule. Under the law, the court reasons if a competing restauranteur were to picket the plaintiff's place of business, he could be enjoined. But the defendant's doing the same acts cannot be enjoined. Hence, the plaintiff is denied the equal protection of the law. The obvious answer to this argument is that the plaintiff is not adversely affected by the failure to include competitors in the privileged class. Only he who is hurt by an omission can complain.[36] There is a more fundamental reply, however. Legislation is not a symmetrical scheme. It tries to control disparate facts. The situations in labor disputes and in trade rivalries are essentially different—so wholly diverse that it has never occurred to recorded memory to suggest the elimination of injunctions in the latter type of controversies. The state has the power of selecting its objects. The workmen's compensation laws were not applied to all industry at their first passage. In some states they included only businesses having more than a specified number of employees; [37] in others, only the more dangerous trades.[38] Only with the confidence born of successful experience were the laws extended.[39]

The inadequacy of a typical judicial interpretation rests on (1) an antipathy for those means of reaching an end that are foreign to the judges' customary ways of thought, and (2) an obscure perception of the legitimate aims of the police power. The court seems to understand effort only toward minor reform.[40] It does not clearly realize that the maintenance of what in a general way we may

---

[33] "The broad distinction between one's right to protection against a direct injury to one's fundamental rights by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute, is manifest upon its statement." 42 Sup. Ct. 128.

[34] *Ibid.*

[35] *Chicago etc. Ry.* v. *McQuire* (1911) 219 U. S. 549, 31 Sup. Ct. 259.

[36] *Rosenthal* v. *New York* (1912) 226 U. S. 260, 33 Sup. Ct. 27.

[37] See *Borgnis* v. *Falk, supra,* footnote 26; *Ives* v. *South Buffalo Ry., supra,* footnote 27.

[38] N. Y., Laws 1910, c. 674, art. 14a.

[39] N. Y., Laws 1914, c. 41.

[40] *E. g., Williams* v. *Arkansas* (1910) 217 U. S. 79, 30 Sup. Ct. 493 (forbidding soliciting for certain types of business on trains within the state).

call the classes of those who employ and those who are employed is the keystone of our present national life. Researches in the constitutional history of our country reveal the understanding on the part of the fathers of the existence of the dominant and servient elements of our population.[41] If the court felt the fundamental character of this proposition it would probably be more receptive to statutes like that in the instant case. The labor element in Arizona was sufficiently intelligent and powerful to force the passage of the instant statute. The probable result of it, if sustained, would have been to satisfy the labor population and not unreasonably diminish the property rights of employers. At the most, the movement toward compulsory arbitration would have been accelerated. The frustration, upon invalid grounds, of this attempt legally to remedy their difficulties, can but breed dissatisfaction.

DIRECTED VERDICT UNDER THE NEW YORK CIVIL PRACTICE ACT.—Section 457(a) of the New York Civil Practice Act provides that the " . . . judge may direct a verdict when he would set aside a contrary verdict as against the weight of evidence." The provision is new, and changes the New York law. There was considerable confusion among the earlier authorities in this state with respect to when a verdict could be directed, some cases apparently applying the test adopted by the Civil Practice Act,[1] others clearly repudiating it.[2] The rule, in the absence of statute, was definitely settled in 1901 by the case of *McDonald* v. *Metropolitan Street Railway Co.*,[3] where the court explicitly declared that the fact that an opposite verdict could be set aside as against the weight of all the evidence did not constitute grounds for directing a verdict,[4] though a verdict might be directed when a contrary one would have to be set aside for lack of more than a scintilla of evidence.[5] Until changed by the Civil Practice Act, this doctrine remained the New York law.[6] It is still law in the majority of jurisdictions[7] including the

---

[41] Beard, *Economic Interpretation of the United States Constitution* (1913).

---

[1] *Dwight* v. *Germania Life Ins. Co.* (1886) 103 N. Y. 341, 8 N. E. 654; *Linkauf* v. *Lombard* (1893) 137 N. Y. 417, 33 N. E. 472, and cases cited therein; see *Hemmens* v. *Nelson* (1893) 138 N. Y. 517, 529, 34 N. E. 342. *Fealey* v. *Bull* (1900) 163 N. Y. 397, 57 N. E. 631, attempts to distinguish the last two cases on the ground that actually there never was more than a scintilla of evidence. *Cf. Stuart* v. *Simpson* (N. Y. 1828) 1 Wend. 376.

[2] *Bagley* v. *Bowe* (1887) 105 N. Y. 171, 11 N. E. 386. In *Fealey* v. *Bull, supra,* footnote 1, p. 400, the court quotes *Colt* v. *Sixth Avenue R. R.* (1872) 49 N. Y. 671, as follows: "It is not enough to justify a nonsuit that the court on a case made might, in the exercise of its discretion, grant a new trial and give the parties the privilege of submitting the questions of fact to a new jury. The evidence may be sufficient in law to sustain a verdict, although so greatly against the apparent weight of evidence as to justify the granting of a new trial."

[3] 167 N. Y. 66, 60 N. E. 282.

[4] "While in many cases, even where the evidence is sufficient to sustain it, a verdict may be properly set aside and a new trial ordered, yet, that in every such case the trial court may whenever it sees fit, direct a verdict, and thus forever conclude the parties, has no basis in the law, which confides to juries and not to courts the determination of the facts in this class of cases." *Ibid.* 69.

[5] *Ibid.* 70. See also *Fealey* v. *Bull, supra,* footnote 1.

[6] *Getty* v. *Williams Silver Co.* (1917) 221 N. Y. 34, 116 N. E. 381; *Seyford* v. *Southern Pacific Co.* (1916) 216 N. Y. 613, 111 N. E. 248; *Padbury* v. *Metropolitan St. Ry.* (1902) 71 App. Div. 616, 75 N. Y. Supp. 952.

[7] *E. g., Little Rock, etc. Ry.* v. *Henson* (1882) 39 Ark. 413; *Bailey* v. *Robison* (1908) 233 Ill. 614, 84 N. E. 660; *Buford* v. *Louisville & Nashville R. R.* (1884) 82 Ky. 286; *McDonough* v. *Metropolitan Life Ins. Co.* (1917) 228 Mass. 450, 117 N. E. 836; *Clark* v. *Stitt* (1894) 12 Ohio C. C. 759; *Dinan* v. *Supreme Council* (1904) 210 Pa. 456, 60 Atl. 10; *Lewis* v. *Prien* (1897) 98 Wis. 87, 73 N. W. 654; see *Altee* v. *Railway Co.* (1884) 21 S. C. 550, 558; *Drew* v. *Lawrence* (1916) 37 S. Dak.